Supreme Court, U.S.
FILED

96 510 SEP 30 1996

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM BLAND, *et al.*,

Petitioners,

v.

DANIEL WM. FESSLER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED

1. Does California Civil Code § 1770(v) ("the civil statute"), which requires a live human operator to be used with an Automatic Dialing and Announcing Device ("ADAD") to deliver any pre-recorded commercial message by telephone, violate the First Amendment?

2. Does California Public Utilities Code § 2874 ("the utilities statute"), which requires a live human operator to be used with an ADAD to deliver most pre-recorded messages by telephone, violate the First Amendment?

PARTIES INVOLVED AND RULE 29.6 STATEMENT

Petitioners are: William Bland and the National Association of Telecomputer Operators ("NATO"), an Oregon nonprofit corporation. Pursuant to Rule 29.6 of the Rules of this Court, petitioner NATO states that it has no parent company, subsidiary, or affiliate within the meaning of Supreme Court Rule 29.6.

Respondents are: Daniel Wm. Fessler, P. Gregory Conlon, Norman D. Shumway, Jessie J. Knight Jr., and Patricia M. Eckart, in their individual and official capacities as California Public Utilities Commissioners ("PUC"), and Daniel E. Lungren, in his official capacity as Attorney General of the State of California ("AG").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners William Bland and the National Association of Telecomputer Operators ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 88 F.3d 729. The opinion of the district court is not reported.

JURISDICTION

The initial judgment of the court of appeals was entered on April 1, 1996. A timely petition for rehearing was filed on April 12, 1996. In response to the petition for rehearing, the court of appeals withdrew its April 1, 1996 opinion and entered a new judgment on July 2, 1996. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

California Public Utilities Code § 2874[1] provides in pertinent part:

> "(a) Whenever telephone calls are placed through the use of an automatic dialing-announcing device, the device may be operated only after an unrecorded, natural voice announcement has been made to the person called by the person calling. The announcement shall do all of the following:
>
> (1) State the nature of the call and the name, address, and telephone number of the business or organization being represented, if any.
>
> (2) Inquire as to whether the person called consents to hear the prerecorded message of the person calling.
>
> (b) The calling person described in subdivision (a) shall disconnect the automatic dialing-announcing device from the telephone line upon

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[1] The complete text of the California Public Utilities Code relating to the use of ADADs is set forth in App. *infra*, 1b-5b).

> the termination of the call by either the person calling or the person called."

California Civil Code § 1770[2] provides in pertinent part:

> "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> * * *
>
> (v)(1) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message."

STATEMENT OF THE CASE

I. Legal And Factual Background

At the outset, an important point must be made: the live operator requirement imposed by the civil statute and the utilities statute (collectively the "Statutes") effectively bans the use of ADADs to disseminate speech.

An ADAD automatically dials a telephone number, and if a person answers the telephone and chooses to listen, the ADAD automatically plays a pre-recorded

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[2] The complete text of the California Civil Code relating to the use of ADADs is set forth in App., *infra*, 1c).

message to that person. The key feature of an ADAD is its ability to disseminate speech without a live operator. Indeed, by definition, an ADAD cannot involve a live operator because an ADAD is an Automatic Dialing and Announcing Device.[3]

The utilities statute prohibits the use of ADADs unless the message is preceded by a live operator who obtains the called party's consent and discloses the nature of the call and the name, address, and telephone number of the call's sponsor before the prerecorded message is delivered. Cal. Pub. Util. Code § 2874(a)(1) & (2). It also requires that the live operator disconnect the ADAD upon termination of the telephone call. Cal. Pub. Util. Code § 2874(b). The California Public Utilities Commission may enforce the utilities statute with fines and disconnection of telephone services. Cal. Pub. Util. Code § 2876. Certain ADAD generated calls are exempt from the utilities statute, such as calls from certain organizations and calls from those who have an established relationship with the called party. Cal. Pub. Util. Code § 2872(d).

Similarly, the civil statute makes it an unfair business practice to disseminate an unsolicited prerecorded message by telephone without a live operator first obtaining the called party's consent and disclosing the name of the caller or the organization represented and the address or telephone number of the caller. Cal. Civ. Code § 1770(v). There is no

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[3] By way of analogy, if a law required that any user of an answering machine must first have a live person answer the telephone before transferring the call to the answering machine, this would effectively ban answering machines because the whole point of the machine is to work automatically and without a live operator.

disconnect requirement under the civil statute. The California Attorney General may enforce the civil statute with fines, Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and any person violating the civil statute is subject to a civil action for damages, including punitive damages. Cal. Civ. Code §§ 1780-1784. The civil statute does not apply to: prerecorded messages generated by a party who has an established relationship with the called party; prerecorded messages regarding the collection of an existing obligation; or to any prerecorded messages generated at the request of the called party. Cal. Civ. Code § 1770(v)(2).

Furthermore, the civil statute only applies to commercial speech, *i.e.*, it only applies if the prerecorded message relates to "a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770. The utilities statute, on the other hand, applies to most ADAD calls on any subject matter, whether political, religious, or otherwise. For example, under the utilities statute, the following uses of ADADs would violate the law: a political candidate seeking to contact his or her constituents to disseminate a "get out the vote" message or to conduct a survey of voter interests and concerns; a religious organization seeking to contact local residents regarding an upcoming function; or a school board seeking to inform residents of a pending school board meeting.

Thus, the Statutes effectively foreclose an entire method of communication, namely, ADADs. These restrictions are particularly burdensome because they forbid a form of speech that is the only one that is economically viable and practical for a great number of speakers with limited financial resources.

Petitioner William Bland ("Mr. Bland")[4] is the owner of a small carpet cleaning company. C.A. App. 33.[5] Although he had initially tried various methods of advertising (such as direct mailing, advertising in the Yellow Pages, and newspapers), his results were minimal. C.A. App. 72. He then started using ADADs to contact potential customers and, eventually, approximately 50 percent of his business was derived from leads generated by using ADADs. C.A. App. 34.[6]

Mr. Bland used two ETS-1500 ADAD machines. C.A. App. 72. When his ADADs were in use, they were controlled by an internal timing device that prevented them from making calls after 9:00 p.m. and before 9:00 a.m. C.A. App. 73. In addition, his ADADs contained a disconnect feature, which is incorporated in modern ADADs, that terminates a telephone call within one second if the contacted person hangs up. C.A. App. 69, 73. In addition, Mr. Bland's ADADs, again using current technology, were

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[4] Petitioner National Association of Telecomputer Operators ("NATO"), is a nonprofit corporation whose members are individuals or legal entities that would, were it not for the Statutes, use ADADs for lead generation and for advertising their products or services.

[5] Cites to "C.A. App." are to the Joint Appendix filed by the parties in the court of appeals.

[6] Unlike large companies that use live operators to attempt to complete a transaction during an unsolicited telephone contact, ADADs are usually used by small businesses for "lead generation." In other words, ADADs are not used to enter, negotiate, or complete a transaction. Rather, they are a means of generating leads, *i.e.*, to identify people who are interested in a given product or service. These people are then contacted later by a human being to discuss the purchase of the goods or services. C.A. App. 34, 72.

programmed not to dial (*i.e.*, to "block out") numbers of, *e.g.*, emergency services, government agencies, hospitals, and businesses having sequential telephone numbers. C.A. App. 69, 72.

Mr. Bland used his ADADs to deliver a 15 second introduction, which asked the called party to consent to hear his 45 second message by pressing the number "1" on the telephone. The 45 second message provided general information regarding carpet cleaning specials his business was offering. C.A. App. 73-74.

On May 18, 1994, Mr. Bland was contacted by his telephone company and informed that his use of ADADs without live operators violated the utilities statute and that further use of these devices would result in his loss of all telephone services. C.A. App. 74. Mr. Bland immediately discontinued using his ADADs. C.A. App. 810. Mr. Bland's fear that the Statutes would be enforced against him prompted this action.

II. Proceedings in the District Court

In October 1994, Petitioners filed their Complaint in the United States District Court for the Central District of California, alleging that the Statutes violated their rights under the First Amendment. Petitioners also filed a preliminary injunction motion, seeking to enjoin the enforcement of the Statutes. Jurisdiction in the district court was founded upon 28 U.S.C. §§ 1331 and 1343(a)(3).

On November 21, 1994, the district court denied Petitioners' preliminary injunction motion. On March 13, 1995, the district court granted the PUC's and the AG's Motion for Summary Judgment and Motion to Dismiss, respectively, stating that the time, place, and manner, and commercial speech tests applied and that the Statutes survived scrutiny under these tests.

III. Proceedings in the Court of Appeals

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291. On April 1, 1996, the Ninth Circuit entered judgment and affirmed the district court judgment. The court of appeals did not rule on the constitutionality of the civil statute, instead holding that because the AG had never enforced the civil statute, the action against the AG must be dismissed because Petitioners lacked standing to challenge it. The court of appeals then held that the utilities statute was a valid time, place, and manner restriction on speech.

A timely petition for rehearing or, in the alternative, suggestion for rehearing *en banc* was filed on April 12, 1996. Petitioners argued that the court of appeals' decision regarding Petitioners' standing to challenge the civil statute was in direct conflict with decisions of this Court, the Ninth Circuit court of appeals, and other courts of appeal, which hold that to establish standing, plaintiffs need only show an actual and well-founded fear that a law will be enforced against them. Petitioners also argued that the court of appeals' ruling on the merits of the utilities statute was based on incorrect factual and legal premises.

In response to the petition for rehearing, the court of appeals withdrew its April 1, 1996 opinion and entered a new judgment on July 2, 1996. In it, the court of appeals reversed its earlier ruling and held that Petitioners had standing to challenge the civil statute.

However, the court of appeals held that neither the utilities statute nor the civil statute violated the First Amendment. The court of appeals held that the civil statute restricted only commercial speech and that it survived the commercial speech test set forth in

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980).

In addition, the court of appeals repeated its earlier ruling that the utilities statute was a valid time, place, and manner restriction on speech. The court held that the utilities statute was content-neutral, despite its exemptions for ADAD message relating to particular topics, because the court of appeals concluded that these topics related to subjects that "the recipient wants to hear." *App.* 10a. The court further held that the utilities statute served significant governmental interests (residential privacy and prevention of workplace annoyance and disruption), *App.* 13a-14a, was narrowly-tailored to serve those interests, and that there existed ample alternative channels of communication.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve Important And Recurring Questions Left Open By This Court Regarding The Proper Test To Be Applied To Restrictions That Regulate Commercial Speech

a. Certiorari Should Be Granted To Answer The Question Left Open By Footnote 11 In *Cincinnati v. Discovery Network* Regarding Regulation Of Commercial Speech

As the court of appeals recognized, the civil statute prohibits the use of ADADs only if the prerecorded message contains "commercial speech," *i.e.*, the civil statute only applies to ADAD calls that are "undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or

services to any consumer." Cal. Civ. Code § 1770. Thus, there is no dispute that the civil statute regulates commercial speech.

Often, the state's asserted interest in regulating commercial speech is in preventing adverse effects stemming from the content of that speech. Here, however, the interest asserted by the government to justify the ban on the use of ADADs did not relate to the content of the speech, but to the method by which it was delivered. The government sought to protect "residential privacy," *i.e.*, to prevent the alleged disruption of privacy at home caused by a telephone ringing due to a call from an ADAD.[7] However, all ADAD calls - no matter what their content - have the same effect on residential privacy. Nonetheless, the civil statute regulates only some ADAD calls, *i.e.*, those ADAD calls that contain "commercial speech." Therefore, whether an ADAD call is regulated under the civil statute depends entirely on the content of the speech disseminated by the ADAD.

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[7] The court of appeals made passing reference to other concerns that are allegedly addressed by the live operator requirement, such as filled-up answering machines and disconnect problems. App. 15a. However, the court of appeals implicitly conceded that there are other means to address these problems than the live operator requirement, by stating that these other concerns are caused by "unregulated ADADs." App. 15a (emphasis added). The court had to make that concession because the uncontroverted evidence presented to it was that modern ADADs do not fill up answering machines or fail to disconnect. C.A. App. 69, 73. Thus, the ban on ADADs effected by the live operator requirement cannot be upheld by such concerns because those concerns can easily be met in other ways, e.g., quick disconnect requirements. Indeed, the federal ADAD statute already has a five second disconnect requirement for ADADs. *See* 47 U.S.C. § 227(d)(3)(B); 47 C.F.R. § 68.318(c)(2).

That is precisely the situation this Court confronted in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). There, this Court suggested that in such a situation strict scrutiny would be applied, because such a regulation is content based, and that the more lenient *Central Hudson* test for commercial speech would not apply.

In *Discovery Network*, the City of Cincinnati asserted that it was addressing safety and esthetics concerns stemming from the proliferation of newsracks. The City, however, only banned those newsracks that contained commercial speech. In striking down the regulation, this Court noted, in footnote 11, that:

> [I]f commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. . . .

Discovery Network, 507 U.S. at 416 n.11. This Court, however, declined to decide this issue because the parties did not challenge the lower court's application of the commercial speech test. This Court went on to hold that the regulation failed to withstand even the less stringent scrutiny applicable to commercial speech under the standards set forth in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), and *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469 (1989).

Thus, this Court left open the question of whether a regulation that purports to restrict commercial speech,

and yet is not "aimed at either the content of the speech or the particular adverse effects stemming from that content," should be analyzed under the intermediate standard of *Central Hudson* or the more exacting scrutiny applied to fully protected speech.

This case squarely raises that important question.[8] Certiorari should be granted to answer it - especially when the courts of appeals are uncertain about the meaning of footnote 11.[9]

b. Certiorari Should Also Be Granted To Answer Questions Left Open By This Court's Recent Holding In *44 Liquormart v. Rhode Island* Regarding The Validity And/Or Application Of The *Central Hudson* Test

Even assuming that the court of appeals was correct in holding that the civil statute should be judged by the *Central Hudson* test for "commercial speech," this Court's recent splintered decision in *44 Liquormart,*

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[8] Indeed, in *Discovery Network*, this Court specifically noted that "the principal reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices." 507 U.S. at 426 n.21 (emphasis added).

[9] The lower courts have expressed conflicting views as to how this question should be answered. *Compare Rappa v. New Castle County*, 18 F.3d 1043, 1074 (3rd Cir. 1994) (holding that "it seems fairly clear after *Discovery Network* that it is unconstitutional to ban commercial speech but not non-commercial speech--at least absent a showing that the commercial speech has worse secondary effects") *with Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 609 (9th Cir. 1993) (concluding that footnote 11 did not offer sufficient direction regarding "the commercial-noncommercial analytical distinction").

Inc. v. Rhode Island, 116 S. Ct. 1495 (1996), left several questions unanswered regarding the validity of such statutes, as well as how, if at all, the *Central Hudson* test is now to be applied. This case squarely presents those important questions.

i. Certiorari Should Be Granted To Resolve Whether A Regulation That Prohibits Only Commercial Speech Is Subject To Lesser First Amendment Scrutiny

Implicit in the civil statute's ban of ADAD messages that contain only commercial speech is the government value judgment that such speech is of lower First Amendment value than other speech. In *44 Liquormart*, this Court engaged in an extensive re-examination of the commercial speech doctrine, yet left it unclear as to how a regulation of only commercial speech is to be evaluated under the First Amendment. A number of the Justices of this Court seemed to agree that certain regulations, that regulate commercial speech, will now be subject to the test applied to fully protected speech.

Justice Stevens' lead opinion noted the history in this country of commercial speech and the well-established recognition of the value of such speech. 116 S. Ct. at 1504 ("Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market) (citations omitted). However, commercial speech can be regulated to ensure its accuracy. 116 S.Ct. at 1505. Nevertheless, recognizing the importance of the free flow of commercial information, Justice Stevens indicated that it is "error to assume that commercial speech [is] entitled to no First Amendment protection or that it [is] without value in the marketplace of ideas." 116

S. Ct. at 1504, *citing Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975).[10]

Justice Steven's opinion then turned to the *Central Hudson* commercial speech test. Although that case established a test for regulation of commercial speech, that decision also recognized that "serious First Amendment concerns" are raised by any "advertising prohibitions that do not protect consumers from commercial harms." 116 S. Ct. at 1506. Thus, Justice Stevens, joined by Justices Kennedy and Ginsburg, held that it is incorrect to assume that "*all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. *The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.*" 116 S. Ct. at 1507 (first emphasis original, second emphasis added).

Some kinds of regulations aimed at commercial speech are only entitled to lesser First Amendment protection, *i.e.*, where the aim of the regulation is to prevent advertising or solicitation that is either fraudulent, misleading, or has the potential to exert "undue influence" over consumers.[11] Other regulations aimed at commercial speech, however, will

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[10]Justice Thomas concurred, stating that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." 116 S. Ct at 1518.

[11]"It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than non-commercial speech.'" 116 S. Ct. at 1508 (internal quotations and citations omitted).

be subject to the scrutiny applicable to fully protected speech, *i.e.*, where the regulation serves ends unrelated to the potential harms of the speech itself. In other words, if a regulation that purports to regulate commercial speech is based on the conclusion that such speech is of lesser value, this raises pure First Amendment concerns and, accordingly, stringent constitutional review is appropriate because the regulation involves suppression of truthful, non-misleading speech.

Justice Stevens, joined by Justices Kennedy and Ginsburg, appeared to propose the following test to determine when a higher level of scrutiny will apply:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

116 S. Ct. at 1507.

Justice Thomas also rejected the notion that "'commercial' speech [can] be censored in a variety of ways for any of a variety of reasons because, as was said without clear rationale in some post-*Virginia Pharmacy Bd.* cases, such speech [is] in a 'subordinate position in the scale of First Amendment values,' . . . or of 'less constitutional moment.'" 116 S. Ct. at 1517-18 (Thomas, J., concurring) (citations omitted).

Accordingly, such restrictions on speech, based on the rationale that commercial speech is of "lesser value," will be subjected to the protections afforded fully protected speech.

Under this standard, the civil statute would be subject to the strict scrutiny and not the intermediate scrutiny applied under *Central Hudson*. There is no allegation here that the speech in Petitioners' ADAD messages is misleading or deceptive. Moreover, there is no contention, nor could there be, that the ADAD messages involve "aggressive sales practices." ADADs simply deliver a prerecorded message that cannot exert any undue influence over the called party nor can ADADs negotiate and complete transactions - they merely generate leads. Ironically, the state has not even seen fit to regulate speech that involves this danger, *i.e.*, telemarketers who use live operators who can cajole, persuade, and influence a called party and who can complete an entire transaction during a call.

The civil statute effectively bans ADADs (by imposing the live operator requirement). Yet, it is not aimed at "preservation of a fair bargaining process." Rather, the state purports to be interested in protecting residential privacy. But *all* ADAD calls have the same effect on residential privacy, regardless of their content. Yet, the civil statute only bans those ADADs that carry speech which is "commercial" solely because of a perceived "lesser value" of that speech.

Certiorari should be granted to resolve whether commercial speech is entitled to full First Amendment protection unless it involves misleading speech or preservation of a fair bargaining process.

ii. Even Assuming The *Central Hudson* Commercial Speech Test Is Applicable To The Civil Statute, Certiorari Should Be Granted To Resolve The Questions Left Open By *44 Liquormart* Regarding The Proper Application Of That Test

Although Justices Stevens, Kennedy, Ginsburg, and Thomas, in *44 Liquormart*, seemed to indicate that a regulation that solely regulates commercial speech will be subject to the standards of fully protected speech, Justices Stevens, Kennedy, and Ginsburg went on to apply the *Central Hudson* test. Combined with the concurrence of Justice O'Connor (which was joined in by Chief Justice Rehnquist and Justices Souter and Breyer), a majority of this Court appears to now apply two important and substantial changes to this test. Certiorari should be granted to clarify these new standards and resolve when they are applicable.

First, under *Central Hudson*, a state is required to demonstrate that a restriction on commercial speech directly advances the state's asserted interest. 447 U.S. at 566. In *44 Liquormart*, however, Justice Stevens indicated that if the restriction involves the suppression of truthful, nonmisleading information, the state must show that the regulation "*significantly*" promotes such an interest. 116 S. Ct. at 1509 (original emphasis). This appears to require the state to meet a higher burden than in the past to justify commercial speech regulations. However, just what showing would meet this test is totally unclear. Certiorari should be granted to explain what this new test means and what showing will meet it.

Moreover, even assuming that this test could be met, Justice Stevens indicated that the state must show

that the restriction on speech is "no more extensive than necessary" and, thus, a prohibition on speech (even on purported commercial speech) will not survive constitutional scrutiny if there exists "alternative forms of regulation that would not involve any restriction on speech." 116 S. Ct. at 1510. Justice O'Connor concurred. 116 S. Ct. at 1521 (regulation must be stricken if "[t]he State has other methods at its disposal - methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers") (O'Connor, J., concurring).

Here, as discussed below, there are numerous alternative forms of regulation to protect residential privacy that would not involve a restriction on speech. Accordingly, certiorari should be granted to determine whether the fourth prong of the *Central Hudson* test, as set forth in *44 Liquormart,* is far more stringent than that it has been in the past.

II. Certiorari Should Be Granted Because The Court Of Appeals' Decision Conflicts With This Court's Decisions Regarding The Proper Balancing Between Privacy And The First Amendment

The court below was confronted with the following situation: a particular method of disseminating speech was considered to be annoying and disruptive by a majority of the public. Those engaging in this form of communication required the contacted party to immediately respond, often summoning individuals from meals, sleep, or other matters they were attending to in the privacy of their home. Finally, there was no limit to the number of times a homeowner could be disturbed by this method of communication. In response, the state sought to ban this method of

communication in the name of protecting residential privacy and preventing potentially fraudulent and criminal activity that could arise from this method of communication. Speakers who sought to use this method of communication did so because it was particularly inexpensive and effective - especially for speakers who were not wealthy. They challenged this ban on the grounds that it violated the First Amendment.

The "court" confronted with this situation was also this Court, over fifty years ago in *Martin v. City of Struthers*, 319 U.S. 141 (1943). In that case, this Court held that under these circumstances, the First Amendment interest in free speech outweighed the state's asserted interest in "protection of the householders from annoyance." 319 U.S. at 144. Although admitting that "[c]onstant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home," the state's ban on an entire medium of expression could not be allowed. Why? Because there existed a simple alternative that did not restrict speech: homeowners could post a "no solicitors" sign on their doors and the state could punish those who disobeyed the homeowners' choice not to be disturbed.[12]

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[12]The decisions of this Court, in which the Court was confronted with a need to balance residential privacy against First Amendment rights, all affirm the holding in *Martin* and, together, reveal a consistent theme: a regulation of speech that is justified by an interest in protecting residential privacy will only be upheld if there are no other reasonable means by which residential privacy can be protected. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), this Court upheld an ordinance prohibiting the use of sound trucks in residential areas. This Court held that, unlike the situation in *Martin*, where the house owner could protect himself from the speech by posting

That is precisely the situation presented by this case. The evidence before the court of appeals, which was unrefuted, was that there currently exists a number of options that allow telephone subscribers to, in essence, hang a "no solicitors" sign on their telephone. C.A. App. 819-821.[13] For example, as far back as 1986, there were already systems available that made it "both reasonable and practical to compile lists of those who prefer not to receive unsolicited calls and to use these lists to prevent telemarketers from calling such individuals." Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*,

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a "no-solicitor" sign, that same house owner is "practically helpless to escape the interference with his privacy by loudspeakers except through the protection of the municipality." 336 U.S. at 86-87.

Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court upheld an ordinance that prohibited picketing before or about a residence. This Court again distinguished *Martin* on the basis that in *Martin* "the home owner could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed," whereas in *Frisby*, the "especially offensive" tactic of picketing someone's home left the homeowner with "no ready means of avoiding the unwanted speech." 487 U.S. at 486-87. Here, there are ample alternative means to allow individuals to avoid any unwanted speech, which are explained below.

[13] *See* Szefczek *v. Hillsborough Beacon*, 668 A.2d 1099, 1109 (N.J. Super. L. 1995) (upholding federal law regarding live telemarketers against First Amendment challenge, primarily because such calls are only prohibited after a calling party has failed to comply with a called party's request to be placed on a "do not call" list).

4 Yale J. On Reg., 99, 121 (1986) ("Nadel").[14] Moreover, there also exist "tone devices" for telephones in which a telephone subscriber can activate a special feature on their telephone that makes it play a special tone before the calling party hears the first ring. *Id.* at 124. An ADAD can detect such tones and immediately disconnect prior to the first ring and, thus, this tone device feature could act as "the telephonic equivalent of a 'no solicitors' sign, unobtrusively warning unsolicited callers not to disturb a subscriber." *Id.*

The court of appeals, however, held that the alternative of a "do not call" list is not sufficient to protect privacy. The court's reasoning, however, directly conflicts with the reasoning of this Court in *Martin*.

First, the court of appeals stated that a "do not call" list places the burden on the public to stop unwanted ADAD calls. App. a15. By holding that posting "no solicitor" signs is a satisfactory alternative to a complete ban on solicitors, this Court held that this is precisely where any "burden" should be placed. In any event, this purported "burden" is trivial: adding one's name to a "do not call" list could be done by simply returning a post card enclosed with your phone bill. In *Martin*, this Court found that similar "burdens," namely, purchasing and putting up "no solicitors" signs, are not objectionable.

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[14]Such an alternative could be utilized at no cost to telephone subscribers. *Id.* at 122 (noting that the cost of maintaining this list "could be financed by charging telemarketers who desire to use it."). Indeed, just such a "do not call" list system, with this form of cost shifting, is already in use in Florida. C.A. App. 820.

Second, the court of appeals stated that "do not call" lists impose an "all-or-nothing" choice upon the public. The court, however, did not address the fact that *Martin* involved the same "all-or-nothing" choice - a homeowner that decides to put up a "do not disturb" sign has also elected to foreclose all communications, and yet this choice did not render the alternative unreasonable. A homeowner who wants to receive some door-to-door solicitations and not others must answer the door and determine if he or she wants to receive that particular message. Similarly, a homeowner who wants to hear some ADAD calls, but not others, must listen to the calls and choose for themselves which they wish to hear.

Indeed, a telephone subscriber is offered more choice than the homeowner in *Martin* who must choose all or nothing. A telephone subscriber can choose a universal "do not call" list, can instruct specific callers not to call again (as provided by federal law[15]), or can choose no list at all.

Finally, the "tone device" option offers the best of all worlds - it allows homeowners to activate a special tone on their telephones, which alerts a calling party that the homeowner does not wish to receive unsolicited phone calls. Nadel at 123-24. This device could be activated at any time the homeowner does not wish to be disturbed. *Id.*

The point is that, under these alternatives, the decision will lie where it should: with each individual, and not with the state.

There is no reasonable distinction between the facts in *Martin* and this case that would change how the

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[15] *See* 47 C.F.R. § 64.1200(e)(2).

balance between privacy rights and First Amendment rights must be resolved. The court of appeals, however, distinguished this case from *Martin* on two grounds, neither of which are persuasive.

First, the court of appeals stated that the "annoyance and disruption" of ADADs are of a "different order of magnitude" than door-to-door solicitors because, rather than the face to face confrontation with a door-to-door solicitor, an ADAD call represents a "one-way onslaught of information." App. 8a. The court of appeals elaborated on this point, stating that ADAD calls are different from door-to-door solicitors because they do not allow the called party to tell the calling party not to call again nor do they allow the caller to "feel the frustration" of the called party. In short, the court below felt that it was of constitutional significance whether parties receiving calls were able to yell at their callers.

This Court has regularly reached just the opposite conclusion, holding that states have far greater power to prohibit in-person communications than those which are not in-person.[16] Moreover, the court's statement is factually wrong. The undisputed evidence presented to the court of appeals was that ADADs do allow callers to indicate that they do not wish to be called again. C.A. App. 74. All that is needed is a legal

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[16] *Compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (upholding disciplinary rule which prohibited attorneys from engaging in in-person solicitation, stating that such solicitation "may exert pressure and often demands an immediate response") *with In re Primus*, 436 U.S. 412, 435 (1978) (striking down disciplinary rule that prohibited solicitation by mail because a mailer "as contrasted with in-person solicitation . . . [does not] afford any significant opportunity for overreaching or coercion").

requirement that the ADAD have a feature that allows the person called to record a response to the caller, which is well within the capabilities of existing technology. C.A. App. 74. Furthermore, to contend that speech can be banned just because it does not allow the recipient to express his or her frustration at having received it is the equivalent of requiring all speech to be interactive, a proposition which this Court has already rejected. *See Riley v. National Federation of Blind*, 487 U.S. 781, 795 (1988).

Second, the court of appeals stated that, unlike a complete bar on door-to-door solicitation, the Statutes leave homeowners "free to decide for themselves whether or not to listen to prerecorded messages" because of the consent option. App. 9a. This makes no sense - the only way an ADAD user can obtain "consent" is to have a live operator obtain it, after the phone has rang - this cannot possibly protect privacy.

The salient facts in *Martin* are identical to those in this case, except that this case involves a new technology. By failing to apply the reasoning of *Martin*, the court of appeals has unquestionably "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Accordingly, certiorari is appropriate for this reason alone, because proper application of *Martin* requires the invalidation of both Statutes.

III. Restrictions On The Use Of ADADs Are Becoming Increasingly Widespread And Are The Subject Of Conflicting Lower Court Decisions. This Court Should Grant Certiorari To Address The Important Question Of Whether Banning This Valuable Means Of Expression Comports With The First Amendment

Absent review by this Court, the decision below will have substantial and deleterious ramifications far beyond the particular parties and facts at issue. Congress and at least 42 state legislatures have enacted laws that either ban ADADs altogether or substantially restrict their use. App. 4a. Disputes over the proper constitutional standards to apply to challenges to these laws will continue to proliferate until this Court resolves those issues.

Federal and state judges have reached conflicting conclusions as to the constitutionality of these restrictions. Two courts have held statutes that ban the use of ADADs unconstitutional. *Lysaght v. State of N.J.*, 837 F. Supp. 646 (D.N.J. 1993) (preliminary injunction issued against New Jersey statute on First Amendment grounds; converted to permanent injunction by Consent Order entered April 20, 1995); *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (Or. 1993) (Oregon statute invalidated on state constitutional free expression grounds). Other courts have rejected similar constitutional challenges. *State by Humphrey v. Casino Marketing*, 491 N.W.2d 882 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993) (upholding Minnesota statute that banned use of ADADs for commercial speech); *Van Bergen v. State of Minn.*, 59 F.3d 1541 (8th Cir. 1995) (upholding Minnesota ADAD statute that had been amended to ban all uses of ADADs); *Moser v. FCC*, 46 F.3d 970

(9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995) (upholding federal ADAD statute).

Whether or not complete bans on ADADs are constitutional is particularly important because ADADs are a medium of communication that allow "speakers with relatively less wealth [to] assert their right to free expression." Nadel, 4 Yale J. On Reg. at 113. This Court has repeatedly held that heightened First Amendment scrutiny is warranted when restrictions are placed on methods of communication "essential to the poorly financed causes of little people." *Martin*, 319 U.S. at 146; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813 (1984); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977). However, as one commentator has noted, state and federal restrictions are "virtually sounding the death knell" for ADAD users - especially small businesses like Petitioners. Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* Colum. Bus. L. Rev. 417, 420 (1991).

The knee-jerk reaction of many to the decision below is "good, I hate those darn machines!" This, undoubtedly, was the reaction of the majority to door-to-door solicitors in 1943 when *Martin* was decided. However, this Court realized that "[w]hile door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." *Martin*, 319 U.S. at 145. Similarly, the evidence demonstrates that a substantial portion of the public wants to receive ADAD generated calls. The preamble of the federal law relating to ADADs states that telemarketing calls generated over 400 billion

dollars of business in 1990. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 47 U.S.C.A. § 227 (West 1994). Obviously, millions of people find such calls useful. Moreover, this is just a matter of common sense - if ADADs did not produce a significant number of positive responses, they would not be in use!

Petitioner William Bland's experience shows that, when given the opportunity, many consumers *do* respond favorably to messages transmitted by ADADs. Now, Mr. Bland and countless others like him have been foreclosed from an entire medium of expression, notwithstanding the fact that a simple method exists to protect the interest of all of the interested parties, *i.e.*, options that that allow homeowners (and businesses) to place a "do not disturb" sign on their phones.

All new technologies seem to provoke a Luddite reaction. This seems to be particularly true with ADADs. However, whatever problems they create can be dealt with by "do-not-call" lists and similar devices. An entire medium of communication should not be strangled just because many, even a majority, objects to it. *Martin* is controlling. It appropriately reconciles the competing privacy and First Amendment interests, and should have been followed below. Certiorari should be granted to ensure the proper application of *Martin* to the many disputes that have and will continue to arise from the numerous laws that regulate ADADs.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 30, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William Bland and
National Association of
Telecomputer Operators,

Plaintiffs-Appellants,

v.

Daniel Wm. Fessler, P.
Gregory Conlon; Norman
D. Shumway; Jessie J.
Knight Jr.; and Patricia M.
Eckart, in their individual
and official capacities as
Public Utilities
Commissioners, and
Daniel E. Lungren, in his
official capacity as
Attorney General of the
State of California,

Defendants-Respondents.

No. 95-55522
D.C. No.
CV-94-07275-ER

ORDER AND
OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
November 17, 1995 - Pasadena, California

Filed July 2, 1996.

Before: Betty B. Fletcher, William C. Canby, Jr., and Michael Daly Hawkins, Circuit Judges

Opinion by Judge Fletcher

COUNSEL

Rex S. Heinke, Los Angeles, California, for the plaintiffs-appellants.

Ronald A. Reiter, Los Angeles, California, and Mark Fogelman, San Francisco, California, for the defendants-appellees.

ORDER

The opinion filed April 1, 1996, Slip op. 3923, is withdrawn.

OPINION

FLETCHER, Circuit Judge:

Plaintiffs appeal the grant of summary judgment dismissing their action against the Commissioners of the California Public Utilities Commission and the dismissal on a Rule 12(b)(6) motion of their action against the Attorney General of California. Plaintiffs' action challenges on First Amendment grounds two California statutes that regulate Automatic Dialing and Announcing Devices ("ADADs"), machines that dial telephone numbers and deliver prerecorded messages. We affirm.

I. FACTS AND PRIOR PROCEEDINGS

William Bland used ADADs to advertise his carpet cleaning services. Bland's ADADs provoked

consumer complaints to the telephone company. One telephone user reported he could not terminate calls from Bland's ADADs: "I hung up my telephone several times, but the recording continued and tied up my line for at least a couple of minutes." This consumer also complained that Bland's ADADs were extremely misleading as to the identity of the calling party. In May 1994, the telephone company notified Bland that his use of ADADs violated California law and threatened to disconnect his telephones if he didn't stop using them. Bland immediately stopped using his ADADs.

Two California statutes prohibit the use of ADADs unless a live operator first identifies the calling party and obtains the called party's consent to listen to the prerecorded message. Cal. Pub. Util. Code § 2874(a) ("the utilities statute");[1] Cal. Civ. Code § 1770(v)(1)

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[1] The utilities statute, which exempts calls between parties with an existing relationship and calls from schools, nonprofit organizations, utilities, and public-safety officials, *see infra*, provides:

> Whenever telephone calls are placed through the use of an automatic dialing-announcing device, the device may be operated only after an unrecorded. natural voice announcement has been made to the person called by the person calling. The announcement shall do all of the following:
>
> (1) State the nature of the call and the name, address, and telephone number of the business or organization being represented, if any.
>
> (2) Inquire as to whether the person called consents to hear the prerecorded message of the person calling.

("the civil statute").[2] The California Public Utilities Commission may enforce the utilities statute with fines and the disconnection of telephone service. Cal. Pub. Util. Code § 2876. The California Attorney General may enforce the civil statute with fines, Cal. Bus. & Prof. Code § 17200 et seq., and citizens injured by violations of the civil statute may file suit for damages, Cal. Civ. Code §§ 1780-1784. The utilities statute applies to all ADAD users, subject to exceptions; the civil statute applies only to commercial users of ADADs.

The State of California is not alone: Congress has also restricted the use of ADADs, 47 U.S.C. § 227 (the Telephone Consumer Protection Act of 1991), as have more than forty states, S.Rep. No. 102-178, 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. ADADs are common; hundreds of thousands of solicitors have used them to contact millions of people. *Id.* The California

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[2] The civil statute, which also exempts calls between parties with an established relationship, provides:

> The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> . . .
>
> > Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

legislature found that "[u]nsolicited prerecorded calls are a source of great aggravation to many people, interrupting their affairs and tying up their lines." Cal. Sen. Judiciary Comm., Hearing Report on AB 4084 of June 19, 1990, at 2. Congress found that ADAD calls are annoying and disruptive in the following ways:

- automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations;
- the entity placing the automated call does not identify itself;
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency;
- some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party . . . .

S.Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. at 1969.

In October 1994, Bland and the National Association of Telecomputer Operators ("NATO")[3] sued the Commissioners and the Attorney General of California in federal district court, alleging that both of California's ADAD statutes violate the First and Fourteenth Amendments to the United States Constitution. In March 1995, the court upheld both statutes, granting the Commissioners' motion for summary judgment pursuant to Rule 56, and granting the Attorney General's motion to dismiss pursuant to Rule 12(b)(6). Plaintiffs appeal. The Attorney General urges on appeal that the dismissal of the action against him should have been for lack of standing, rather than for failure to state a claim.[4]

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[3] NATO is a nonprofit corporation whose members advertise their products or services by telephone.

[4] The Attorney General moved to dismiss under Rule 12(b)(6). However, he argued both jurisdictional bar and failure to state a claim. The latter is properly brought under Rule 12(b)(6). The former apparently is amenable to dismissal only under Rule 12(b)(6) in this circuit. *See Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994) (mootness and ripeness properly challenged under Rule 12(b)(l)); *but see generally* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1360, at 435-37 (2d ed. 1990) (courts are not uniform in this view).

The district judge stated "the claim that there is no justifiable case or controversy is not well taken. There is a case or a controversy sufficient to request declaratory relief." However, because the judge had found the utilities statute constitutional and concluded that the civil statute was substantially the same, he ruled that no claim could be stated against the Attorney General. He therefore dismissed the civil statute claim under Rule 12(b)(6).

II. DISCUSSION

The appeal presents three questions. First, is the utilities statute constitutional? Second, do the plaintiffs have standing to challenge the civil statute?[5] Third, is the civil statute constitutional?

A. THE UTILITIES STATUTE

Plaintiffs argue that the utilities statute violates the First Amendment. We review determinations as to the constitutionality of a statute de novo. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993).

Two recent decisions guide our analysis: this court's *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), and the Eighth Circuit's *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), both of which upheld ADAD statutes as permissible time, place, and manner restrictions on speech. *Moser* concerned a federal ADAD statute, 46 F.3d at 972 (considering 47 U.S.C. § 227), and *Van Bergen* concerned a Minnesota ADAD statute, 59 F.3d at 1544-45 n.2 (considering Minn. Stat. §§ 325E.26-.31). Both statutes resemble the statute at bar.

The plaintiffs argue that two different decisions ought to guide our analysis: *Martin v. City of Struthers*, 319 U.S. 141 (1943). and *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991), both of which struck down statutes prohibiting door-to-door solicitation. We find *Martin and Project* 80's inapposite for two reasons.

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[5] None of the defendants argue that the plaintiffs lack standing to challenge the utilities statute, violations of which by Bland the telephone company invoked as a threat to cut off Bland's service if he did not terminate the use of ADADs.

First, compared to door-to-door solicitors, the annoyance and disruption of ADADs is of a different order of magnitude. As the Eighth Circuit explained, ADAD calls create a much greater problem because of their "sheer quantity" and the fact that they offer recipients who want to hang up immediately no opportunity to tell the caller not to call again. *Van Bergen,* 59 F.3d at 1555. Moreover, while door-to-door solicitation involves a conversation between two people, ADADs involve a one-way onslaught of information. Indeed, Congress determined that ADAD calls are "more of a nuisance and a greater invasion of privacy" than telemarketing with live operators, as ADADs "cannot interact with the customer except in preprogrammed ways" and "do not allow the caller to feel the frustration of the called party . . . ." S.Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. at 1972. ADADs are less like door-to-door solicitation and more like sound trucks and public address systems, both of which the government may regulate. *Kovacs v. Cooper,* 336 U.S. 77 (1949) (plurality opinion) (sound trucks); *Ward v. Rock Against Racism,* 491 U.S. 781 (1989) (public address systems).

Second, while the statutes in *Martin* and *Project 80's* prohibited essentially all door-to-door solicitation,[6] whether or not a homeowner wanted to speak to a solicitor, the statute at bar permits the use of ADADs, so long as the called party consents to listen to the prerecorded message. Central to the door-to-door solicitation decisions were concerns over the dangers of state paternalism that deprives people of

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[6] Both statutes in *Project 80's* exempted "requested or invited" solicitors and one of them (the Pocatello ordinance) exempted persons who solicit donations for charities or nonprofit organizations. *Project 80's,* 942 F.2d at 636-37.

information they might wish to receive. *Martin,* 319 U.S. at 141 (solicitation should "depend upon the will of the individual master of each household, and not upon the determination of the community"); *Project 80's,* 942 F.2d at 638-39. In contrast, the California statute makes no decisions for the called parties who remain free to decide for themselves whether or not to listen to prerecorded messages.

Thus, *Moser* and *Van Bergen* inform our inquiry, and not *Martin* and *Project 80's.* However, neither the federal ADAD statute upheld in *Moser* nor the Minnesota ADAD statute upheld in *Van Bergen* is identical to the California statute. The federal statute regulates only calls to residences, while the California statute regulates calls to both residences and businesses. Although Minnesota's statute applies to both residences and businesses, its exemptions are different. Accordingly, we must apply discretely to the California statute the time, place, and manner test, to determine whether its particular restrictions 1) are content neutral, 2) serve a significant governmental interest, 3) are narrowly tailored to serve this interest, and 4) leave open ample alternative channels of communication. *Ward,* 491 U.S. at 791 (citations omitted).

1. Content Neutrality

For the purposes of analysis, the utilities statute can be divided into its central prohibitory provision and its exemptions.

The statute forbids the use of ADADs unless preceded by a live operator who identifies the calling party and obtains the called party's consent to listen to the prerecorded message. Cal. Pub. Util. Code § 2874(a). This provision simply prescribes a *method* of communication, not its content. "A regulation that

serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

The statute contains two kinds of exemptions, both of which are content neutral. The statute has a global exemption for parties with an existing relationship: "This article does not apply to any [ADAD] . . . that is used solely to transmit a message to an established business associate, customer, or other person having an established relationship with the person using the [ADAD] . . . . Cal. Pub. Util. Code § 2872(f). The statute also exempts calls from nonprofit organizations to their members. *Id.* at § 2872(d)(2). These exemptions rest not on the content of the message, but on existing relationships implying consent to the receipt of ADAD calls. *See Van Bergen,* 59 F.3d at 1550 (upholding exemption where "the caller has a relationship with the subscriber implying the subscriber's consent to receive the caller's communications").

Other exemptions do relate to content, some involving existing relationships, others not. The statute exempts calls 1) from schools to parents regarding student attendance, 2) from cable and utility companies to customers regarding previously arranged installation of facilities, 3) from petroleum, chemical, and nuclear facilities concerning emergencies, and 4) from police and fire officials concerning public safety and emergencies. Cal. Pub. Util. Code § 2872(d), (e). Although regulating content, all of these exemptions are based on relationships implying consent to receive ADAD calls, or messages the recipient wants to hear, or both: parents want to know of their children's attendance, consumers of cable and utility services want installation information, and everyone wants information concerning public safety and emergencies.

Plaintiffs, however, argue that these exemptions improperly privilege some relationships over others. We disagree. The statute exempts ADAD communications between all persons and entities with established relationships. That it exempts some emergency situations and callers but not others[7] is not a fatal flaw. Underinclusiveness of the emergency exemptions cannot possibly indicate a preference for one side of a debate over the other.

Plaintiffs also argue that the group-based exemptions improperly contain content-based restrictions. However, the "principal inquiry" in content neutrality cases is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward,* 491 U.S. at 791. Not a scintilla of evidence suggests that the State of California disapproves of parent-teacher communication regarding student grades, as opposed to the communication about student attendance that the statute permits. Nor do the restrictions on the content of the messages the other exempted groups may convey -- cable companies may call only regarding previously arranged service installation, and dangerous facilities may call only regarding disasters -- carry the scent of government favoritism in the free market of ideas.

2. The Government Interests

The State of California has a significant interest in protecting the public from ADAD calls, whether received at home or at work. ADADs can generate an incredible volume of prerecorded telephone calls: "Certain data indicate that the machines are used by

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[7] Plaintiffs suggest, for example, that munitions facilities are not exempted.

more than 180,000 solicitors to call more than 7 million Americans every day. Each [ADAD] has the capacity to dial as many [as] 1,000 telephone numbers each day." S.Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. at 1970. Bland's two ADADs, which deliver 60-second messages for twelve hours a day, Declaration of William Bland of Oct. 22, 1994, at 2-3, could call in excess of a half million telephones a year. Such calls, received at either residences or places of business, have the potential to annoy and disrupt.[8]

The Minnesota Supreme Court described the threat posed by telephone solicitation to residential privacy as follows:

> the residential telephone is uniquely intrusive. The caller . . . is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. . . . Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom.

State by Humphrey v. Casino Marketing Group, 491 N.W.2d 982, 888 (Minn. 1992), *cert. denied,* 507 U.S. 1006 (1993). This court likewise concluded that "Congress accurately identified automated telemarketing calls as a threat to privacy." *Moser,* 46 F.3d at 974.

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[8] Because we conclude that the protection of privacy is a sufficiently significant governmental interest to justify the statute, we need not address plaintiffs' arguments with respect to other rationales.

The State of California's significant interest in protecting residential privacy is well established. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby v. Schultz,* 497 U.S. 474, 484 (1988) (citations omitted). The Supreme Court has repeatedly upheld against First Amendment challenge speech restrictions that seek to protect residential privacy. *Id.* (upholding residential picketing ban); *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978) (upholding FCC prohibition of indecent speech on the airwaves); *Rowan v. Post Office Dept.*, 397 U.S. 728, 73637 (1970) (upholding postal regulation of offensive mail); *Kovacs,* 336 U.S. at 88-99 (upholding sound truck ban).[9]

The State of California's significant interest in protecting the public from ADADs does not end when telephone users leave their homes. ADADs are "a source of great aggravation to many people, interrupting their affairs and tying up their lines." Cal. Sen. Judiciary Comm., Hearing Report on Assembly Bill 4084 of June 19, 1990, at 2. People receiving

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[9] Plaintiffs invoke *Carey v. Brown,* 447 U.S. 455 (1980) (striking down residential picketing ban that exempted labor pickets), for the proposition that the utilities statute's exemptions undermine its privacy rationale. *Carey* is inapposite. While pickets disrupt privacy and union pickets disrupt residential privacy as much as pickets by other groups, ADAD calls' disruption of privacy are of a different magnitude. Moreover, the guiding principles in *Carey* were the Court's "profound national commitment to the principle that debate on public issues should he uninhibited, robust, and wide-open," 447 U.S. at 462-63 (citations and quotations omitted), and the Court's disapproval of favoritism for speech by labor unions to the exclusion of others' protests on other subjects of public interest and importance.

ADAD calls are no less aggravated because they are at work and not at home. In residences and in workplaces, ADADs tie up lines, fill up answering machines, and impose costs on the called parties. S.Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. at 1970. Indeed, "business subscribers believe that these calls are an impediment to interstate commerce." *Id.* at 1969.

The State of California's significant interest in protecting people at work from the annoyance and disruption of ADADs is well grounded in law. The Eighth Circuit held in *Van Bergen* that

> individuals at work in private businesses are entitled to expect that they will not be disturbed except by personal or business invitees, just as, at their residence, they are entitled to expect privacy. *Cf. Mancusi v. De Forte,* 392 U.S. 364, 369 (1986) (holding that the occupant of an office has standing to challenge warrantless search of his office because entitled to expect only invitees to enter his office).

59 F.3d at 1554 (full citation omitted).[10] Moreover, speakers have no right to turn people who are outside of their homes into a "captive audience" that is "incapable of declining to receive" a message. *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (upholding a ban on political

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[10] Although *Van Bergen* also held that the "efficient conduct of business operations" is a significant governmental interest justifying limits on free speech, 59 F.3d at 1554, we view this rationale with caution and skepticism. *See Waters v. Churchhill,* __ U.S. __, __, 114 S. Ct. 1878, 1888 (1994) ("The government cannot restrict the speech of the public at large just in the name of efficiency.").

advertisements on car cards on buses because commuters are a captive audience). The Minnesota Supreme Court has noted that ADADs turn telephone users into a "captive audience." *Casino Marketing,* 491 N.W.2d at 889.

3. Narrowly Tailored

The utilities statute substantially promotes the government's interest in protecting telephone users at home and at work from the annoyance and disruption of ADAD calls. By requiring ADAD users to obtain the called party's consent before playing a prerecorded message, the statute allows telephone users to avoid ADAD messages they don't want to hear, and prevents the problems caused by unregulated ADADs (e.g., filled-up answering machines, failures to disconnect, tied-up lines, and attendant costs and inconveniences imposed on called parties).

The statute is narrowly tailored to achieve its goals. While time, place, and manner restrictions on speech that "disregard far less restrictive and more precise means are not narrowly tailored," *Project 80's,* 942 F.2d at 638, they need not be "the least restrictive or least intrusive means" of accomplishing the government's goals. *Ward,* 491 U.S. at 798.

Here, no less restrictive means of accomplishing the government's objectives is readily apparent. Neither alternative strategy proposed by the plaintiffs -- "do not call" lists and self-help -- can effectively protect privacy in the home and workplace. A "do not call" list would place the burden on the public to stop disruptive ADAD calls from arriving at homes and places of work. Moreover, a "do not call" list would force people to make an all-or-nothing choice about prerecorded messages, while California's statute allows people to choose to hear some but to reject others.

The plaintiffs also suggest that the state government eschew legislation and allow people to protect themselves from ADADs as they see fit by turning off their ringers, screening their calls with answering machines, or by simply hanging up on prerecorded calls. However, self-help is no substitute for the statute's protections. Turning off ringers forces people into isolation. Screening is not available to people too poor to afford an answering machine and would clutter the machines of those who can afford them. Hanging up does not allow the called party to tell the caller not to call again and does not always disconnect the call.

4. Alternative Channels of Communication

The utilities statute leaves ample alternative channels free to the public to disseminate messages through the use of handbills, bill boards, magazines, newspapers, television, radio, telemarketing, and even ADADs introduced by a live operator.

Bland claims that no other means of advertising is remotely as effective as ADADs, that the utilities statute is destroying his business and forcing him to lay off his employees, and that the live operator requirement drives up the cost of using an ADAD from less than $2,000 to more than $50,000. Even if these claims are credited, the fact that "more people may be more easily and cheaply reached" by a particular method of speech is not the test. *Kovacs,* 336 U.S. at 88-89.

B. THE CIVIL STATUTE

We address first the Attorney General's challenge to plaintiffs' standing, and then address the civil statute's constitutionality.

1. Standing

We review standing de novo. *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1080 (9th Cir. 1987).

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). However, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Id.* (citation omitted)."[11] That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases, "[f]or free expression -- of transcendent value to all society, and

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[11] *In Babbitt.* the Supreme Court further explained:

> When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual want or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); see *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Evers v. Dwyer*, [358 U.S. 202, 204 (1958)]. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 198 (1973).

442 U.S. at 298. Although Bland and other ADAD users in California do not face criminal penalties, they do face grave consequences for violations of the civil statute, including civil fines and private suits for damages.

not merely to those exercising their rights -- might be the loser." *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965).

Bland has suffered injury. He once used ADADs without live-operator introductions, conduct proscribed by both the civil and utilities statutes. Although, in fact, he stopped because of the telephone company's threat, he is also under the cloud of the civil statute's penalties. Bland claims that he cannot afford to hire live operators. Declaration of William Bland of Oct. 22, 1994, at 4. The civil statute thus places Bland between the rock of foregoing the use of his ADADs and the hard place of violating the law. He claims that his compliance with the civil statute has cut his income by 50% and caused him to lay off three employees. *Id.* Had he chosen to violate the civil statute, he would have run a substantial risk of civil fines and private enforcement actions.

While the Attorney General has never enforced the civil statute against anyone,

> [w]e are not troubled by the pre-enforcement nature of this suit. *The State has not suggested that the newly enacted law will not be enforced,* and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without actual prosecution.

Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393 (1988) (emphasis added). *See also Mobil Oil Corp. v. Attorney General of the Commonwealth of Virginia,* 940 F.2d 73, 76 (4th Cir. 1991) (plaintiff has standing where "the Attorney General has not . . . disclaimed any intention of exercising her enforcement

authority"); *KVUE, Inc. v. Moore*, 709 F.2d 922, 930 (5th Cir. 1983) (plaintiff has standing where "[t]he state has not disavowed enforcement"), *aff'd*, 465 U.S. 1092 (1984).

The Attorney General of California has not stated affirmatively that his office will not enforce the civil statute."[12] Indeed. the Attorney General sponsored the bill that became the civil statute, Cal. Ass. Utilities and Commerce Comm., Hearing Report on AB 4084 of May 7, 1990, at 2, the California legislature intended the Attorney General to enforce the civil statute, Cal. Sen. Judiciary Comm., Hearing Report on AB 4084 of June 19, 1990, at 3, and the Attorney General has the power to enforce the civil statute, Cal. Bus. & Prof. Code §§ 17200 et. seq. Moreover, the civil statute, which has been on the books for only six years, has not fallen into desuetude. *See San Francisco County Democratic Cent. Comm. v. Hu*, 826 F.2d 814, 821-822 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).

Bland chose to obey both the civil and utilities statutes and to bring a declaratory action challenging their constitutionality, rather than to violate the law, await an enforcement action against him, and raise the statutes' constitutionality as a defense. Bland's decision was altogether reasonable and demonstrates a commendable respect for the rule of law. Under the circumstances of this case, Bland should be allowed to test the law. *See Mobil Oil*, 940 F.2d at 75 ("Public policy should encourage a person aggrieved by laws he

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[12] It is true that Senior Assistant Attorney General Herschel T. Elkis declared that the Attorney General's office "has not brought or indicated that it would bring any action" under the civil statute. However, this is far short of a disavowal of enforcement. There is little comfort in these words for an ADAD user.

considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.").

The Attorney General argues in the alternative that an order by this court, a federal court, striking down a state statute will not remedy the injury to Bland because this court cannot stop California's consumers from enforcing the civil statute against Bland in the California courts. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (no standing unless a favorable decision will likely remedy the injury). The Attorney General notes that consumers have the power to enforce the civil statute, Cal. Civ. Code §§ 1780-84, and that California's courts have held that they are not bound by lower federal court interpretations of the United States Constitution, *People v. Bradley,* 460 P.2d 129, 132 (Cal. 1969) (en banc) ("we are not bound by the decisions of the lower federal courts even on federal questions"); *People v. Perez,* 279 Cal. Rptr. 915, 919 (Cal. Ct. App. 1991) (citing *Bradley* to reject federal appeals court decisions regarding the Sixth Amendment).

We voiced "serious doubts" about the argument that state courts may ignore the decisions of federal circuit courts on federal questions in *Yniguez v. State of Arizona,* 939 F.2d 727, 736 (9th Cir. 1991), *aff d in part, rev'd in part sub nom. Yniguez v. Arizonans for Official English,* 42 F.3d 1217 (9th Cir. 1995), *aff d upon reh'g,* 69 F.3d 920 (9th Cir. 1995) (en banc), *cert. granted,* ___ U.S. ___, 116 S. Ct. 1316 (1996). There, a party argued that the interests of two proposed Rule 24(a) intervenors were not practically impaired because they could relitigate the federal constitutional questions in the Arizona state courts. 939

F.2d at 735-36. We criticized this argument, noting 1) the likelihood that Congress intended the federal courts "to have the final word on questions of federal law," 2) the dangers of "considerable friction between the state and federal courts as well as duplicative litigation," and 3) the fact that "for so many years a right of appeal to the Supreme Court was provided in all cases in which federal circuit courts held state statutes unconstitutional." *Id.* at 736-37.

We do not now reach this question. However, even if the Attorney General is correct, an order by this court striking down the civil statute would certainly help redress Bland's injury. Of Bland's potential legal adversaries, the Attorney General of California has far and away the greatest resources, both economic and political. The doctrine of claim preclusion would preclude the Attorney General from relitigating the constitutionality of the civil statute against Bland, in either state or federal court. Were we to find the statute unconstitutional, it would be of immense benefit to Bland. *See Yniguez,* 939 F.2d at 737 ("While [an order striking down a statute] may have left [private parties'] right to sue intact, a right to bring a private enforcement action is not a complete substitute for executive enforcement and implementation. Hence, as a practical matter, the [order] substantially weakened [the statute] . . . .").

The Fourth Circuit reached a similar conclusion in a similar case. In *Mobil Oil,* a company sued the Attorney General of Virginia to challenge the constitutionality of a new statute, and the Attorney General argued that private enforcement provisions in the statute prevented standing. 940 F.2d at 76. The court rejected this argument, reasoning that the possibility of a dispute between the company and private parties "does not bear on whether [the company] has a dispute with the Attorney General,"

and noting the likelihood that the Attorney General would intervene in any private litigation to defend the constitutionality of the statute. *Id.* at 76-77.

2. The Constitutionality of the Civil Statute

Much of our earlier analysis with respect to the utilities statute is applicable here, but there are differences between the statutes. Particularly, while the utilities statute affects (with exceptions) all users of ADADs, the civil statute restricts only commercial speech. Communication that "does no more than propose a commercial transaction" is commercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, 385 0973)). The civil statute regulates only speech that proposes a commercial transaction. See Cal. Civ. Code § 1770 ("The following . . . acts . . . undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful . . . .").

While the First Amendment protects commercial speech, *Virginia Pharmacy,* 425 U.S. at 762, it "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York,* 447 U.S. 557, 563 (1980). Since we find constitutional the utilities statute that is more broadly applicable, i.e., to all users of ADADs (except for special exemptions), we need not indulge in a discussion of the possible erosion of the *Central Hudson* doctrine. By definition, if the utilities statute is constitution so too is the civil statute.

Like the utilities statute, the California legislature intended the civil statute to protect the people of

California from "intrusive telephone marketing schemes," noting that unsolicited ADAD calls cause "great aggravation to many people, interrupting their affairs and tying up their lines." Cal. Sen Judiciary Comm., Hearing Report on Assembly Bill 8084 of June 19, 1990, at 2. Beyond the protection of privacy interests, the civil statute is concerned as well with the prevention of additional evils: "unfair methods of competition" and "deceptive acts" in the commercial context. Cal. Civ. Code § 1770.[13]

Clearly, the civil statute satisfies *Central Hudson's* requirement that "the regulation directly advance[] the governmental interest asserted," 447 U.S. at 566. "[T]he fit between the governmental interest and the legislative means chosen to promote it 'need not be perfect, but simply reasonable.'" *Association of Nat'l Advertisers, Inc. v. Lungren,* 44 F.3d 726, 732 (9th Cir. 1994) (quoting *Association of Nat'l Advertisers, Inc. v. Lungren,* 809 F. Supp. 747, 757 (N.D. Cal. 1992)), *cert. denied,* ___ U.S. ___, 116 S. Ct. 62 (1995).

The Supreme Court's recent decision in *Rubin v. Coors Brewing Co.,* ___ U.S. ___, 115 S. Ct. 1585 (1995), does not affect the analysis of this case. There, the Supreme Court held that a ban on the display of alcohol content on beer labels did not directly advance the government's goal of suppressing alcohol strength wars. The Court reasoned that "the irrationality of this unique and puzzling regulatory

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[13] The legislature found the use of ADADs without a "natural voice first informing the person answering" of identifying information concerning the caller and "obtaining the consent of that person to listen" to be an unfair method of competition and a deceptive practice. Cal . Civ. Code § 1770(v)(1).

framework" -- the law failed to address any other beer advertisements or any aspect of wine and spirits -- "ensures that the labeling ban will fail . . . ." *Id.* at 1593. Here, while the civil statute allows ADAD calls between parties with an existing relationship and does not address other forms of telemarketing, it will effectively protect the public from unwanted and unsolicited ADAD calls, which the California legislature not unreasonably found to be unfair competition, deceptive, and unique annoying and disruptive.

III. CONCLUSION

We affirm. The plaintiffs have standing to challenge the civil statute. Both the utilities and civil statutes are constitutional on their faces and as applied.

CALIFORNIA PUBLIC UTILITIES CODE §§ 2871 *et. seq.*

§ 2871. Definitions

As used in this article, "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called.

§ 2872. Regulation and control of automatic dialing-announcing devices; Prohibitions

(a) The connection of automatic dialing-announcing devices to a telephone line is subject to this article and to the jurisdiction, control, and regulation of the commission.

(b) No person shall operate an automatic dialing-announcing device except in accordance with this article. The use of such a device by a person, either individually or acting as an officer, agent, or employee of a person or corporation operating automatic dialing-announcing devices, is subject to this article.

(c) No person shall operate an automatic dialing-announcing device in this state to place a call which is received by telephone in this state during the hours between 9 p.m. and 9 a.m. California time.

(d) This article does not prohibit the use of an automatic dialing-announcing device by any person exclusively on behalf of any of the following:

(1) A school for purposes of contacting parents or guardians of pupils regarding attendance.

(2) An exempt organization under the Bank and Corporation Tax Law (Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code) for purposes of contacting its members.

(3) A privately owned or publicly owned cable television system for purposes of contacting customers or subscribers regarding the previously arranged installation of facilities on the premises of the customer or subscriber.

(4) A privately owned or publicly owned public utility for purposes of contacting customers or subscribers regarding the previously arranged installation of facilities on the premises of the customer or subscriber or for purposes of contacting employees for emergency actions or repairs required by public safety or to restore services.

(5) A petroleum refinery, chemical processing plant, or nuclear powerplant for purposes of advising residents, public service agencies, and the news media in its vicinity of an actual or potential life-threatening emergency.

(e) This articles does not prohibit law enforcement agencies and fire protection agencies from placing calls through automatic dialing-announcing devices, if those devices are used for any of the following purposes:

(1) Providing public service information relating to public safety.

(2) Providing information concerning police or fire emergencies.

(3) Providing warnings of impending or threatened emergencies.

Telephone calls placed by law enforcement agencies and fire protection agencies through automatic dialing-

announcing devices need not comply with Section 2874.

(f) This article does not apply to any automatic dialing-answering device which is not used to randomly or sequentially dial telephone numbers but which is used solely to transmit a message to an established business associate, customer, or other person having an established relationship with the person using the automatic dialing-answering device to transmit the message or to any call generated at the request of the recipient.

(g) The commission may determine any question of fact arising under this section.

§ 2873: Restrictions on use of devices

Automatic dialing-announcing devices may be used to place calls over telephone lines only pursuant to a prior agreement between the person involved, whereby the person called has agreed that he or she consents to receive such calls from the person calling, or as specified in Section 2874.

§ 2874. Requirements for use of automatic dialing-announcing devices

(a) Whenever telephone calls are placed through the use of an automatic dialing-announcing devices, the device may be operated only after an unrecorded, natural voice announcement has been made to the person called by the person calling. The announcement shall do all of the following:

(1) State the nature of the call and the name, address, and telephone number of the business or organization being represented, if any.

(2) Inquire as to whether the person called consents to hear the prerecorded message of the person calling.

(b) The calling person described in subdivision (a) shall disconnect the automatic dialing-announcing device from the telephone line upon the termination of the call by either the person calling or the person called.

§ 2875. Applications for connection of devices; Required information; Denial or modification of application

No person shall connect any automatic dialing-announcing device to any telephone line without first making written application to the telephone corporation within whose service area telephone calls through the use of such device are proposed to be place. In such application, the person shall provide information as to the type of automatic dialing-announcing device proposed to be connected, the time of day such telephone calls are proposed to be placed using such device, the anticipated number of calls proposed to be placed during the specified calling period, the average length of a completed call, and such additional information as the corporation or the commission may require. Upon receiving such an application for service, the corporation shall review the furnished information and, if it appears that calling patterns would create a traffic overload condition or the service would be detrimental to the services of other customers of the corporation, it may deny the application or modify the application and grant the application as so modified.

§ 2876. Violation of article

Any person violating this article is guilty of a civil offense and is subject to either or both of the following penalties:

(a) A fine of not to exceed five hundred dollars ($500) for each violation, levied and enforced by the commission, on complaint or on its own motion, pursuant to Chapter 11 (commencing with Section 2100) of Part 1.

(b) Disconnection of telephone service to the automatic dialing-announcing device for a period of time which shall be specified by the commission.

CALIFORNIA CIVIL CODE § 1770

§ 1770. Unlawful practices

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

* * *

(v)(1) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(2) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

Supreme Court, U.S.
FILED
SEP. 30 1996
CLERK

No. 96-510

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WILLIAM BLAND, *et al.*,

Petitioners,

v.

DANIEL WM. FESSLER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

William Bland, et al. *Plaintiffs,* v. Daniel Wm. Fessler, et al., *Defendants.*	No. CV 94-7275 ER Order Granting Defendant Public Utility Commissioners' Motion For Summary Judgment; Order Entering Judgment

Filed March 13, 1995.
Entered by the clerk, March 15, 1995

The parties came before the Honorable Edward Rafeedie on March 13, 1995, on defendant public utility commissioners' motion for summary judgment. The Court having read and considered the papers filed in support of and in opposition to the injunction and having heard oral argument, GRANTED defendants' motion for the reasons stated in open Court.

Accordingly, JUDGMENT is hereby entered for the defendant Public Utility Commissioners.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: March 13, 1995.

Honorable Edward Rafeedie, United States District Judge.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

William Bland, et al. *Plaintiffs,* v. Daniel Wm. Fessler, et al., *Defendants.*	No. CV 94-7275 ER Order Granting Defendant Lungren's Motion To Dismiss With Prejudice

Filed March 13, 1995.
Entered by the clerk, March 15, 1995

The parties came before the Honorable Edward Rafeedie on March 13, 1995, on defendant Lungren's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court having read and considered the papers filed in support of and in opposition to the injunction and having heard oral argument, GRANTED defendant's motion for the reasons stated in open Court.

Accordingly, the action against defendant Lungren is dismissed with prejudice.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: March 13, 1995.

Honorable Edward Rafeedie, United States District Judge.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

William Bland, et al. *Plaintiffs,* v. Daniel Wm. Fessler, et al., *Defendants.*	No. CV 94-7275 ER

Reporter's Transcript Of Proceedings
Los Angeles, California
Monday, March 13, 1995

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Official Court Reporter
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Los Angeles, California; Monday, March 13, 1995
(10:00 a.m.)

The Clerk: Civil 94-7275, William Bland v. Daniel M. Fesler.

Counsel, please state your names for the record, please.

Mr. Heinke: Good morning, Your Honor. Rex Heinke and Lincoln Bandlow on behalf of the Plaintiffs.

Mr. Fogelman: Mark Fogelman for the Defendant Public Utilities Commissioners, Your Honor.

Mr. Reiter: Ronald Reiter for Defendant Attorney General Lungren.

The Court: This is a motion by the defendant, Public Utilities Commissioner, for summary judgment.

The Court has read and considered the papers that have been filed in support of an in opposition to the motion. And it is the tentative conclusion of the Court that the motion is well taken; that summary judgment should be granted in this case.

As the Court found in November of 1994, Section 2872 et seq, specifically 2874(A) of the Public Utilities Code, is a content neutral statute. The exceptions it permits are not based upon contents, but upon the basis of a pre-existing relationship between the parties. This dispute is susceptible of a content neutral analysis of this statute.

And the Court again finds that Section 1770(B) regulates on the basis of speech. The commercial speech analysis is appropriate for all practical purposes. The time, manner and place restrictions on

content neutral speech has been held to be substantially similar to a commercial speech analysis.

Since we were last in court, the Ninth Circuit has come down with a case called Mosure v. F.C.C. which the Court believes controls this Court's decision in this case.

The Ninth Circuit opinion in Mosure dealt with the identical state law involved here, almost an identical state law that's involved here. In fact, the plaintiffs in their moving papers for a preliminary injunction relied upon the District Court's opinion in Mosure, which found the federal statute to be unconstitutional. A holding which was subsequently reversed by the Ninth Circuit.

The Court here finds that the government interest of residential privacy is substantial, notwithstanding the exception in the statute which permit the use of pre-recorded messages in limited circumstances. The Court finds that the statutes are narrowly tailored to advance this state interest. And the argument that live calls are no less intrusive than pre-recorded calls, and that by choosing to regulate only pre-recorded calls the law makes arbitrary and unconstitutional distinction, is not well taken. In Mosure this same argument was made, and the Ninth Circuit found that an underinclusiveness argument is relevant in a First Amendment situation only when the regulation is an attempt to give one side of the debatable public question an advantage of expressing its views to the people.

Here the laws do not favor a particular viewpoint. In addition, the Mosure court found that it was permissible for Congress to reduce the volume of the telemarketing calls without completely eliminating the calls.

The Court also finds, as in Mosure, that there are ample channels of communication left open. So in sum, for these reasons, the Court grants the defendant Commissioner's motion for summary judgment. There is no material issue of genuine fact for trial. The statutes are constitutional as a matter of law in the view of the Court.

Do you wish to be heard for the plaintiff?

Mr. Heinke: Your Honor, I would make simply one point which the court hasn't explicitly dealt with; that is, after Your Honor denied the preliminary injunction, I think as the court's knows, we did seek appellate review. Our request for emergency relief was denied, but the Ninth Circuit did expedite that appeal. That appeal is now fully briefed in the Ninth Circuit.

The Court: I already ruled on this request for stay, if that's what you are getting to.

Mr. Heinke: Yes, Your Honor.

The Court: There is no point in arguing it. All right. That will be the ruling.

Mr. Reiter: Your Honor, in addition there is a motion --

The Court: I know, counsel. Just stand by here. The attorney general has filed a motion to dismiss under 12(B)6. The Court has read and considered the papers filed by the attorney general and those opposed. The Court finds that the claim that there is no justiciable case or controversy is not well-taken. There is a case or a controversy sufficient to request declaratory relief.

Now the reasons that I have stated with respect to the Public Utilities Commissioner's motion for summary judgment apply equally here in this case.

The plaintiff's first amended complaint should be dismissed under 12(B)6 with prejudice for the reasons I have stated regarding the other motion for summary judgment brought by the Public Utilities Commissioner.

Mr. Heinke: Thank you, Your Honor.

Mr. Fogelman: Thank you, Your Honor. (Proceedings adjourned.)

No. 96-510

(3)

Supreme Court, U.S.
FILED
OCT 23 1996
CLERK

In the Supreme Court

OF THE

United States

October Term, 1996

WILLIAM BLAND AND NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,

Petitioners,

VS.

DANIEL WM. FESSLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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October 22, 1996

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15 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly concluded that the live operator requirement of Cal. Pub. Util. Code §2874 – California's statutory requirement that for unsolicited telephone calls initiated by automatic dialing devices, the caller may not play a prerecorded message unless a live operator first identifies the caller and obtains the call recipient's consent to hear the message – is a constitutionally permissible time, place or manner restriction on protected speech.

2. Whether petitioners' challenge to the separate live operator requirement of Cal. Civil Code §1770(v) presents a justiciable Article III case or controversy, where no party has ever enforced or threatened to enforce that provision against petitioners.

3. Assuming petitioners' challenge to §1770(v) presents a justiciable case or controversy, whether the Ninth Circuit correctly concluded that the live operator requirement of §1770(v) is a constitutionally permissible time, place or manner restriction on protected speech or a constitutionally permissible regulation of commercial speech.

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INTRODUCTION

Petitioners seek review of the Ninth Circuit's rejection of their First Amendment challenge to two California statutes governing the use of "automatic dialing and announcing devices" ("ADADs"). *Bland v. Fessler,* 88 F.3d 729 (9th Cir. 1996); Pet. App. 1a-24a. ADADs are electronic devices that can be programmed to dial random or sequential sets of telephone numbers and, without the consent of the called party, play a prerecorded message that often cannot be disconnected from the called party's telephone line.[1] These devices have the prodigious capacity to dial millions of telephone numbers: less than 200 ADADs can call every home in the United States once a week.[2]

California Public Utilities Code §2874 ("§2874") prevents ADAD users from playing uninvited prerecorded telephone messages unless the message is preceded by a live person who identifies the caller, obtains the called party's consent to hear to the message, and disconnects the ADAD from the telephone line when either party hangs up. Pet. App. 3b-4b.

California Civil Code §1770 is part of the state's Consumer Legal Remedies Act. The Act is an economic and consumer protection provision that defines more than 20

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[1] There are at least two types of automatic dialing devices that fall within the statutory definition of ADAD contained in Cal. Pub. Util. Code §2871 – one that dials a telephone number and then automatically plays a prerecorded message when the call is answered, and one that allows a live person to pick up the line after the call is answered, to converse with the called party and then, presumably with the called party's consent, to play the prerecorded message. C.A. App. 3, 69. The use of the latter type of ADAD complies with California law and is not at issue in this case.

[2] *State by Humphrey v. Casino Marketing,* 491 N.W.2d 882, 888 n. 4 (Minn. 1992), *cert. denied,* 507 U.S. 1006 (1993).

different types of unfair methods of competition and unfair acts or practices, one of which is the use of unsolicited prerecorded statements to sell or lease goods or services to consumers. Cal. Civ. Code §1770(v) ("§1770(v)"); Pet. App. 1c. An unsolicited prerecorded message may be played only if the call is introduced by a real person who discloses the identity and address or telephone number of the caller and obtains the consent of the called party to hear the automated message. *Id.*

The Ninth Circuit upheld §2874 as a time, place, or manner restriction and sustained §1770(v) under the *Central Hudson*[3] test for permissible commercial speech regulation. Petitioners do not assail the application of the time, place, or manner doctrine[4] or the method of applying the *Central Hudson* test. Rather, they attempt to entice the Court to use this case as a vehicle to reexamine points supposedly "left open" in the *Discovery Network*[5] and *44 Liquormart*[6] opinions. This case, however, does not provide the proper legal context for revisiting those cases. Moreover, the Ninth Circuit's opinion is correct and perfectly consistent with all apposite appellate authority, and does not call for review by this Court.

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[3] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

[4] In applying the time, place or manner standard, the Ninth Circuit closely followed the test and principles articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and *Kovacs v. Cooper*, 336 U.S. 77 (1949). The Ninth Circuit indicated that §1770(v), like §2874, is sustainable as a permissible time, place or manner restriction. Pet. App. 22a.

[5] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

[6] *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996).

I. THIS CASE IS CONSISTENT WITH *ALL* APPELLATE AUTHORITY

All federal appellate and state supreme courts that have considered First Amendment challenges to ADAD statutes similar to California's have rejected the challenges. *Van Bergen v. Minnesota,* 59 F.3d 1541 (8th Cir. 1995); *Moser v. FCC,* 46 F.3d 970 (9th Cir.), *cert. denied,* 115 S.Ct. 2615 (1995); *State by Humphrey v. Casino Marketing,* 491 N.W.2d 882 (Minn. 1992), *cert. denied,* 507 U.S. 1006 (1993); *see also Destination Ventures, Ltd. v. FCC,* 46 F.3d 54 (9th Cir. 1995) (upholding statute prohibiting unsolicited commercial fax messages).

The cases cited by petitioners do not involve a conflict justifying the grant of certiorari. *Moser v. Frohnmayer,* 315 Or. 372, 845 P.2d 1284 (1993), was decided on state – not federal – constitutional grounds and thus presents no conflict. Similarly, *Lysaght v. New Jersey,* 837 F.Supp. 646 (D.N.J. 1993), is a discredited district court case relying on the dissenting opinion in *Casino Marketing* and on the district court opinion in *Moser v. FCC,* 826 F.Supp. 360 (D.Or. 1993), which was reversed by the Ninth Circuit in *Moser,* 46 F.3d 970. There is simply no decisional conflict warranting this Court's review.

II. THIS CASE DOES NOT ILLUMINATE ANY ISSUE ARGUABLY LEFT OPEN BY FOOTNOTE 11 IN *CINCINNATI v. DISCOVERY NETWORK*

Petitioners contend that *Discovery Network's* footnote 11[7] "left open" the possibility that core First Amendment

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[7] 507 U.S. at 416 n. 11.

scrutiny, rather than more lenient commercial speech standards, should be applied to regulations of commercial speech that have objectives unrelated to commercial harms flowing from that speech. Even if footnote 11 presents this question, the question is not one to be answered in the case at bench.

Unlike the regulation in *Discovery Network*, §1770(v) is aimed directly at the commercial harms emanating from the method used to disseminate commercial messages. California has a substantial governmental interest in fostering fair trade practices[8] and has chosen to do so, in part, by preventing a chaotic competitive scramble for consumer sales at the sacrifice of privacy.[9]

ADADs have the unique and staggering ability to penetrate the sanctity of residential privacy and intrude on efficient business operations.[10] Petitioner Bland's two ADADs, for example, are capable of dialing nearly three quarters of a million, perhaps more, unsolicited calls per year.[11] Congress

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[8] *Cf. California v. Arc America Corp.*, 490 U.S. 93, 101 (1989).

[9] The protection of privacy is, of course, a substantial interest justifying regulation of both commercial and noncommercial speech. *See Frisby v. Schultz*, 487 U.S. 47, 484-85 (1988); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995). Californians in large numbers shield their privacy from being pierced by telephone contact: approximately 50% of the population (7 million households and 16 million people) pay monthly charges to have unlisted telephone numbers, and 11 of the 12 metropolitan areas having the highest proportion of unlisted numbers in the United States are located in California. C.A. App. 236-37, 244-45.

[10] *Van Bergen*, 59 F.3d at 1554-55; *Moser*, 46 F.3d at 972.

[11] Bland operates his two ADADs 12 hours a day, every day, and each machine has the capability of placing 1,000 calls per day, or a remarkable 730,000 calls per year. C.A. App. 319, 818; *see also* S. Rep. No. 102-178, 102d Cong., 2d Sess. (1991), *reprinted in* U.S. Code Cong. & Admin. News 1968, 1970. If, however, each call lasted 15 seconds on average (many calls will be terminated before the entire message is

found that by 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day.[12] Although fewer than 200 ADADs can call every home in the United States once a week,[13] more than 10,000 ADADs have been sold with the capacity of generating an astonishing 10 million calls a day.[14] Indeed, ADAD calls are "flourishing, and becoming a recurring nuisance by virtue of their quantity." *Van Bergen*, 59 F.3d at 1555. The California Legislature attempted to prevent the commercial harm directly flowing from this annoying, perniciously intrusive method of competition for consumer sales:

> Unsolicited pre-recorded calls are a source of great aggravation to many people, interrupting their affairs and tying up their lines. It is believed that consumers should have a right to know who is calling at the outset, and to reject a pre-recorded message before it begins.

Calif. Sen. Judiciary Comm. Rept. On Assembly Bill 408 enacting §1770(v).

Discovery Network's footnote 11 at most questions whether a law may distinguish between commercial and non-commercial speech when the objectives of the law are unrelated to any distinction between the two types of speech. The

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delivered), Bland's two machines alone could make 2.1 million calls per year.

[12] *Moser*, 46 F.3d at 972.

[13] *Casino Marketing*, 491 N.W.2d at 888 n. 4.

[14] C.A. App. 242, 818-819, 848-852. Moreover, while petitioners assert that unlike the many existing and fully operational "older" machines, newer ADADs do not have disconnection problems, Pet. 6, the record shows that Bland's "state-of-the-art" ADADs could not be disconnected from the telephone line of a complaining party on at least two separate occasions. C.A. App. 119, 376, 754-57.

distinction recognized in §1770(v), in contrast, is directly related to the harms created by the use of ADADs in mass market sales campaigns. Accordingly, this case does not present a context in which the purported footnote 11 question can be resolved.

III. THIS CASE DOES NOT INVOLVE THE FIRST AMENDMENT ISSUES DISCUSSED IN *44 LIQUORMART*

This case is a wholly inappropriate medium to elucidate or resolve issues discussed in *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996). *Liquormart* involved a complete, categorical ban on truthful, nonmisleading liquor price advertising to promote temperance objectives rather than correct any commercial harm. The opinions of the Justices varied only on whether and to what extent the *Central Hudson* commercial speech test should be applied to such a categorical ban.

In marked contrast, §1770(v) neither bans nor even regulates the content of any commercial message. Section 1770(v) merely places some restrictions on the manner in which uninvited, prerecorded solicitations may be delivered. The statute allows the use of prerecorded messages as long as a live operator identifies the name and telephone number or address of the caller and secures the consent of the called party to hear the recording.[15] The statute leaves completely unfettered all other forms of consumer solicitations, including live voice telephone calls, door-to-door solicitations, Internet and other electronic communication, leaflets, and newspaper and broadcast advertisements. The case thus does not implicate any of the issues with which the Court grappled in *Liquormart* and does not provide the context for the reexamination of the *Central Hudson* test.

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[15] Nor do the California statutes ban ADADs. *See* Note 1, *supra*.

IV. THIS CASE IS CONSISTENT WITH *MARTIN V. STRUTHERS*

Petitioners' contention that the Ninth Circuit's opinion clashes with *Martin v. Struthers*, 319 U.S. 141 (1943), is predicated on a false analogy between California's limited regulation of prerecorded solicitations and the total ban on door-to-door solicitations denounced by this Court in *Martin*. The outright ban on solicitations interfered with the right of homeowners to decide for themselves whether to receive door-to-door messages; this Court found that homeowners had the right to post their own signs if they wished to ward off unwanted person-to-person sales pitches. *Id.*, at 142, 143-44, 148-49.

The Ninth Circuit correctly noted that the qualitative difference between the onslaught of automated calls and the visit of door-to-door solicitors makes *Martin* inapposite. As the Ninth Circuit observed, the sheer magnitude of ADAD calls and the inability of a called party to interact with a live person and to request not to be called again, make the character of the automated call far different from the live door-to-door solicitation. Pet. App. 8a.[16]

Moreover, the statute found offensive in *Martin* prohibited solicitations whether or not the homeowner wished to receive them. The California statutes, in contrast, permit the

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[16] "When the call is made by a live operator . . . , the recipient has the opportunity to tell the operator, at any point in the conversation, that he does not want to hear from the calling person or entity again. An ADAD does not offer the recipient the option of cutting off the calls; it does not offer householders a choice of whether to respond to the speaker or not. The ADAD recipient may hang up as soon as the message starts, but has no opportunity to tell the machine that he does not want it to call again, and may be obliged, against his will, to respond over and over to the same unwanted caller." *Van Bergen*, 59 F.3d at 1555.

called party to determine on a call-by-call basis which automated messages to receive and which to reject. Thus, §2874 and §1770(v) defend both the principle of individual choice expressed in *Martin* and the privacy of individuals from the encroachment of an otherwise assaultive technology.

Petitioners contend that the live operator requirement is unconstitutional because other alternatives are available to repel unwanted calls. Petitioners advocate the use of "do not call lists" on which telephone subscribers could register their desire not to be called. No evidence was presented that a general list is feasible, and telephone subscribers seeking privacy would have to register themselves (and often their *unlisted* telephone numbers) on an endless number of lists maintained by different businesses. More significantly, a "do not call list" presents consumers with an all-or-nothing choice. The live operator requirement, on the other hand, serves the principle of *Martin* by permitting the called party to learn the identity of each caller and then decide on a call-by-call basis which prerecorded messages to hear.[17]

V. REVIEW OF THIS CASE WILL NECESSARILY INVOLVE AN EXAMINATION OF PETITIONERS' LACK OF STANDING TO CHALLENGE §1770(v)

The California Attorney General has no civil or criminal remedies under §1770(v) against petitioners or anyone else. Nonetheless, petitioners filed this challenge to §1770(v) as a

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[17] Petitioners presented even more unacceptable alternatives to the courts below (*e.g.*, turning off the telephone bell to avoid all calls), which apparently have now been abandoned. Petitioners now, for the first time, refer to a "tone device," the existence, cost, and availability of which are unknown; this Court is not the appropriate forum in which to take new evidence.

civil rights action (42 U.S.C. §1983) against the Attorney General and seek attorney's fees under 42 U.S.C. §1988. Although the Attorney General is legally incapable of directly enforcing the statute, petitioners argued to the courts below, as a purely abstract proposition, that the Attorney General could redress violations of §1770(v) under California's general unfair trade practice statute, Cal. Bus. & Prof. Code §17200, *et seq.* That provision authorizes actions for injunctive relief and civil penalties (not fines as alleged in the petition) to combat unlawful business conduct. The Attorney General, however, *never* enforced, attempted to enforce, or threatened to enforce §1770(v) indirectly against the petitioners or anyone else at any time under any theory of law, including the unfair trade practice statute. C.A. App. 90.

This Court has repeatedly held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United,* 454 U.S. 464, 472 (1982). Finding no standing, the Ninth Circuit originally agreed that "there is simply no 'genuine threat' that the civil statute is 'about to be enforced' [citation] by the Attorney General against Bland or any other member of NATO." April 1, 1996 slip. op., at 3932. This opinion was inexplicably superseded by the final opinion erroneously finding the presence of standing. If this Court grants the petition, the Attorney General will focus on the absence of a case or controversy sufficient to satisfy the threshold jurisdictional requirements of Art. III, §2, of the Constitution.[18]

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[18] Petitioners' failure to satisfy the threshold elements of an action under 42 U.S.C. §1983 will also be at issue. *See Comes v. Toledo,* 446 U.S. 635, 640 (1980).

CONCLUSION

The United States has indeed become idyllic if this case presents one of the paramount constitutional issues to be confronted by the Court this Term. The Ninth Circuit applied well-established time, place, or manner rules and commercial speech doctrine to reject the challenge to reasonable state regulation of uninvited automated telephone calling. In so doing, the Ninth Circuit followed the Eighth Circuit and the Minnesota Supreme Court and acted in harmony with opinions of this Court. This case does not present a vehicle for the examination of unresolved First Amendment issues or the reexamination of well-settled principles. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Petitioners William Bland and the National Association of Telecomputer Operators ("Petitioners") presented several compelling reasons why this Court should grant a writ of certiorari in this case. Respondents' opposition fails to refute those reasons. Rather, Respondents present nothing more than unsubstantiated "doomsday" numbers regarding the use of ADADs in an attempt to prevent rational analysis of the facts and the controlling legal authority.

When this smokescreen is blown away, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

I. The Numbers Presented By Respondents Regarding The Amount Of Calls Placed By ADADs Are Wrong And Irrelevant

A central theme asserted by Respondents in their opposition, as well as throughout this case, is the notion that citizens would be inundated with an "onslaught" of telephone calls by ADADs. This argument is flawed in two ways: First, the numbers asserted by Respondents are internally inconsistent, and; Second, they are irrelevant.

Respondents assert that "less than 200 ADADs can call every home in the United States once a week" (Opposition, p. 1, relying on *State by Humphrey v. Casino Marketing Group*, 491 N.W.2d 882, 888 n.4 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993)) and also state that each ADAD has the capability of placing 1,000 calls[1] per day (Opposition, p. 4, n.11). Even

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[1] It should be noted that the significant figure is not how many telephone numbers that an ADAD can "call." Rather, it

assuming an ADAD makes 1,000 calls a day, these numbers do not compute. 200 ADADs making 1,000 calls a day totals 200,000 calls a day or 1,400,000 a week. That is hardly the 97 million calls necessary to reach every American household.[2] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1995*, p. 1, (115th edition), Washington, D.C., 1995 (97 million households in America). Indeed, Respondents' numbers add up to *approximately one call a year to each household.*

Respondents then contradict themselves by claiming that "more than 10,000 ADADs have been sold with the capacity of generating an astonishing 10 million calls a day" (Opposition, p. 5). Under these figures, since there are 97 million households in America, it would take *10,000* ADADs approximately 9.7 days to call every household. Yet, Respondents had already asserted that a mere *200* ADADs could do this in one week. Again, the numbers do not compute.

Finally, Respondents assert that "in 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day." Opposition, p. 5. This translates into 38.9 calls per ADAD per day, not 1,000 calls per ADAD per day as Respondents previously asserted. One must ask

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is the number of calls actually received that is relevant to any privacy issue since most telephone calls are unanswered. Respondents never introduced any evidence on this point.

[2] Indeed, the truly significant number is the number of telephone numbers that would have to be called, which must be much larger than the number of households because so many people have multiple phone numbers (work, home, car). The proliferation of telephone numbers is demonstrated by the continual need to add additional area codes.

Respondents, is it 1,000 calls per ADAD per day or only 38.9?

Indeed, what Respondents have always ignored is the simple fact that the Oregon Supreme Court and a District Court in New Jersey have held that those states' respective ADAD statutes violate free speech rights, and thus, the use of ADADs is not prohibited in those states. *See Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (Or. 1993) (Oregon Constitution); *Lysaght v. State of New Jersey*, 837 F. Supp. 646 (D.N.J. 1993). If it were true that, without live operators, ADAD calls would swamp telephones throughout the land, surely Respondents would have merely looked to these two states for proof of this. Tellingly, they did not.

In seeking to impose a regulation on speech, it is the government that has the burden of demonstrating that the alleged harms it seeks to remedy are real, and not "mere speculation and conjecture." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Respondents' Opposition did not cite any evidence that demonstrated that ADAD calls present real and concrete harms. Respondents did not cite such evidence because none was ever presented throughout this case.

The prohibition on the use of ADADs cannot be justified if there is no demonstration that a substantial interest is threatened by the use of ADADs. Here, Respondents' unsupported assertions of an "onslaught" of ADAD calls does not meet their burden to prove that a prohibition on speech is justified.

Rather, Respondents are attempting to cloud the issues in this case by presenting a "sky is falling" argument about ADADs. This argument is flawed to begin with because it assumes that every ADAD will be used every day, twelve hours a day, seven days a

week, 365 days a year. There is no evidence to support such an assertion.

Respondents' argument is much like the old story that with enough time, enough monkeys, and enough typewriters, one could duplicate Shakespeare's works. Surely, no one would ban typewriters because of the racket such typing could create if this were to occur. Similarly, ADADs should not be banned because of what they could do, anymore than we would ban all cars because of what could happen if every car was driven every day, twenty-four hours a day, seven days a week, 365 days a year.

Moreover, Respondents cite their numbers to prove that if ADADs generate so many calls, there can be no privacy. Yet, the two statutes that Respondents are defending do not protect privacy, because they allow the use of machines to place unsolicited telephone calls so long as a live operator comes on the line briefly. But this happens after the call has been answered, *i.e.*, after any invasion of privacy has occurred. Thus, whatever the true numbers are, they are irrelevant because the statutes do not protect privacy.

Finally, the exact same arguments could have been made in connection with regulations that prohibited door to door solicitation. Theoretically, every person in America could decide to engage in door to door solicitation and, theoretically, every householder could have their doorbell rang every second of the day! Such fun-with-numbers arguments do not change the simple fact that there is an alternative to banning speech by telephone: a do not call list.[3] No scare-tactic

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[3] Respondents assert that there was no evidence presented that a do not call list is feasible. Opposition, p. 8. However, Respondents have never even attempted to dispute that such a

smokescreen will change this and, under *Martin v. Struthers*, 319 U.S. 141 (1943), this alternative renders the statutes at issue unconstitutional.

CONCLUSION

For all of the reasons set forth above and in the opening petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 5, 1996

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system is in use in Florida. C.A. App. 820. Indeed, with all of the expertise and resources at the Public Utilities Commission's disposal, what is startling is that it offers not one shred of evidence that such a system would not be feasible. Finally, the U.S. Congress has determined that such a system is feasible - it is required under the federal Telephone Consumer Protection Act. *See* 47 U.S.C. § 227(c)(3) & (4); 47 C.F.R. § 64.1200(e)(2).